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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/517,268

10/25/2005

Marie-Louise Amanda Baillon

HO-P0310101US0

1608

26271 7590 03/22/2007  
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EXAMINER

WARE, DEBORAH K

ART UNIT

PAPER NUMBER

1651

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
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3 MONTHS

03/22/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/517,268

Applicant(s)

BAILLON ET AL.

Examiner

Deborah K. Ware

Art Unit

1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 27 December 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 8, 11, 14-18 and 21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8, 11, 14-18 and 21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

Claims 8, 11, 14-18 and 21 are presented for reconsideration on the merits.

#### ***Response to Amendment***

The amendment and extension of time filed December 27, 2006, have been received and entered. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. § 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 17-18 and 21 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Since the microorganism is recited in the claims, it is essential to the invention recited in those claims. It must therefore be obtainable by a repeatable method set forth in the specification or otherwise be readily available to the public. If the microorganism is not so obtainable or available, the requirements of 35 U.S.C. § 112 may be satisfied by a deposit of the microorganism. The specification does not disclose a repeatable

process to obtain the microorganism and it is not apparent if the microorganism is readily available to the public.

It is noted that applicants have deposited the organism but there is no indication in the specification as to public availability. If the deposit is made under the terms of the Budapest Treaty, then an affidavit or declaration by applicants, or a statement by an attorney of record over his or her signature and registration number, stating that the specific strain will be irrevocably and without restriction or condition released to the public upon the issuance of a patent, would satisfy the deposit requirement made herein.

If the deposit has not been made under the Budapest Treaty, then in order to certify that the deposit meets the criteria set forth in 37 C.F.R. §§ 1.801-1.809, applicants may provide assurance of compliance by an affidavit or declaration, or by a statement by an attorney of record over his or her signature and registration number, showing that:

(a) during the pendency of this application, access to the invention will be afforded to the Commissioner upon request;

(b) all restrictions upon availability to the public will be irrevocably removed upon granting of the patent;

(c) the deposit will be maintained in a public depository for a period of 30 years or 5 years after the last request or for the effective life of the patent, whichever is longer; and

(d) the deposit will be replaced if it should ever become inviable.

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Applicant is directed to 37 CFR § 1.807(b) which states:

(b) A viability statement for each deposit of a biological material defined in paragraph (a) of this section not made under the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure must be filed in the application and must contain:

- (1) The name and address of the depository;
- (2) The name and address of the depositor;
- (3) The date of deposit;
- (4) The identity of the deposit and the accession number given by the depository;
- (5) The date of the viability test;
- (6) The procedures used to

obtain a sample if the test is not done by the depository; and

(7) A statement that the deposit is capable of reproduction.

Applicant is also directed to 37 CFR § 1.809(d) which states:

(d) For each deposit made pursuant to these regulations, the specification shall contain:

- (1) The accession number for the deposit;
- (2) The date of the deposit;
- (3) A description of the deposited biological material sufficient to specifically identify it and to permit examination; and
- (4) The name and address of the depository.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to

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be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 8, 11, 14-18 and 21 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 5 of copending Application No. 11/522,721 in view of Farmer (US 6461607).

Claims are drawn to a probiotic, method of making comprising adding a probiotic microorganism to a composition for use in a method of reduction of gastrointestinal Campylobacter infection. The strain is NCIMB 41117.

Copending claim 5 teaches a treatment method by administering a probiotic containing Lactobacillus, and specifically strain NCIMB 41117.

Farmer teaches a probiotic, method of making comprising adding a probiotic microorganism to a composition for use in a method of reduction of gastrointestinal Campylobacter infection. Note column 13, line 5, column 27, lines 1-65 and column 28, line 42. The microorganism can be Lactobacillus acidophilus.

The claims differ from copending claim in that the treatment method is directed to treating gastrointestinal Campylobacter infection.

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to apply the treatment method of copending claim 5 for the treatment of Campylobacter infection as disclosed by Farmer using the strain NCIMB 41117 and Lactobacillus strain because the probiotic is the same and will possess intrinsic properties for which to apply it to a different use with the expectation of

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successful results. One of skill would have been motivated to select Lactobacillus because Farmer clearly teaches its use for the same as claimed. In the absence of persuasive evidence to the contrary the claims are rendered prima facie obvious.

This is a provisional obviousness-type double patenting rejection.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 8, 11, 14-16 remain rejected under 35 U.S.C. 102(e) as being anticipated by Farmer (US 6461607).

Claims are drawn to a probiotic, method of making comprising adding a probiotic microorganism to a composition for use in a method of reduction of gastrointestinal Campylobacter infection.

Farmer teaches a probiotic, method of making comprising adding a probiotic microorganism to a composition for use in a method of reduction of gastrointestinal Campylobacter infection. Note column 13, line 5, column 27, lines 1-65 and column 28, line 42. The microorganism can be Lactobacillus acidophilus.

The claims are identical to the cited disclosure and are therefore considered to be anticipated by the teachings therein.

***Response to Arguments***

Applicant's arguments filed December 27, 2006, have been fully considered but they are not persuasive. The argument that there is no mention of feeding animals a composition containing probiotic in relation to treating *Campylobacter* infection is noted. However, Farmer clearly teaches treating *Campylobacter* in the gastrointestinal tract, note column 28, lines 30-40. Therefore, the argument is not persuasive.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.




All claims fail to be patentably distinguishable over the state of the art discussed above and cited on the previously enclosed PTO-892 and/or PTO-1449. Therefore, the claims are properly rejected.

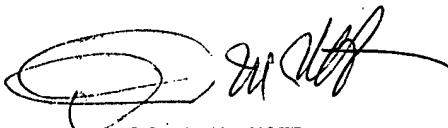
No claims are allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is 571-272-0924. The examiner can normally be reached on 9:30-6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Deborah K. Ware  
March 17, 2007

  
DAVID M. NAFF  
PRIMARY EXAMINER  
ART UNIT 128/657